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No. 97-1382

In The

Supreme Court of the United States

October Term, 1997

DEBORAH GUARAGNA-WILLIAMS; DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL, SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE (HOWELL) FROESE; and CRAIG A. THOMPSON,

Petitioners,

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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I. NATURE OF MEMORANDUM

This is Petitioners' (Williams, Schudel, Schudel, Schudel, Glass, Thompson, and Froese) Reply to General Electric's Brief in Opposition.

Petitioners adopt by reference those arguments made by the other parties who have petitioned. Supreme Court Rule 12(4). In addition, petitioners offer the following specific arguments in reply to the matter advanced in Respondent's Brief in Opposition.

II. RETROACTIVE APPLICATION OF FED.R.CIV.P. 50(b)

A. General Electric Misstates the Record

Respondent General Electric asserts that its filing and service of post-trial motions were proper even under *former* Fed.R.Civ.P. 50(b), in part because lead trial counsel had assumed representation of all plaintiffs, and she had been served by hand delivery within the time allowed by the former rule. Brief in Opposition at 25.

General Electric cites nothing in the record to support its assumption that anyone was designated lead trial counsel or that any party had affirmatively authorized counsel for any other party to accept service of pleadings on his or her behalf. Nothing in the record supports such an assumption, because no such designation was ever made. Moreover, General Electric failed to raise this argument in support of its position before the trial court, thus preventing the development of a factual record on the issue; litigants in the Ninth Circuit, as elsewhere, are well aware that such a course constitutes waiver of the argument on appeal. *In re Estate of Ferdinand E. Marcos Litigation*, 978 F.2d 493 (9th Cir. 1992).

General Electric failed to make this assertion in the trial court because it would have been an untenable argument. All three counsel represented separate individuals. General Electric admits that it served all of its filings on all three counsel; it claims now that it was doing so as a

courtesy. Brief in Opposition at 25, n. 14. General Electric neither refers to nor attempts to explain how its courtesy extended to toleration of three separate opening statements, three separate direct and cross-examinations of witnesses, three separate closing arguments, and three separate rebuttals.[1] In fact, there was never any doubt that the parties were individually represented. If, as Petitioners argue, it is *former* Rule 50(b) which should have been applied to this issue, there is no doubt that General Electric failed to effect timely service of its post-trial motions.[2]

B. GE Fails to Distinguish Between Retroactive Resuscitation of Lapsed Jurisdiction and Retroactive Application of Procedural Rules in Cases Still Pending

On the merits of the issue of retroactivity, Respondent General Electric lists a variety of cases in which courts have retroactively applied rules of procedure, pursuant to this Court's mandate to do so where just and practicable. *See* Brief in Opposition at 16-21. The cited cases involve such issues as initial service of process under Rule 4, the application of attorney sanctions under Rule 11, the amendment of pleadings under Rule 15, and rules relating to the conduct of discovery.

Insofar as Petitioners can determine, none of the cited cases involves the central point at issue here: whether it is "just and practicable" to apply a procedural rule retroactively where to do so would revive lost jurisdiction and reopen a case in which judgment has become final as a matter of law.

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[1] Nor is it likely that General Electric would tolerate three separate Petitions for Writs of Certiorari as has occurred here.

[2] General Electric attempts to argue that it did, in fact, properly serve all counsel by private delivery service. That issue was decided by the 9th Circuit. Timely service did not occur. That issue was not appealed by General Electric.

When Congress attempted to require just such an outcome this Court emphatically denounced the idea. In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 131 L.Ed.2d 328, 1155 S.Ct. 1447 (1995) this Court wrote that:

> When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments *still on appeal* that were rendered before the law was enacted, and must alter the outcome accordingly. *See United States v. Schooner Peggy*, 1 Cranch 103 (1801); *Landgraf v. USI Film Products*, 511 U.S. 244, 273-280 (1994). Since that is so, petitioners argue, federal courts must apply the "new" law created by 27A(b) in finally adjudicated cases as well; for the line that separates lower court judgments that are pending on appeal (or may still be appealed), from lower-court judgments that are final, is determined by statute, see, e.g., 28 U.S.C. 2107(a) (30-day time limit for appeal to federal court of appeals), and so cannot possibly be a constitutional line. *But a distinction between judgments from which all appeals have been foregone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates*: not a batch of unconnected courts, but a judicial department composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not *(unless the time for appeal has expired)* the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy, supra*, at 109. *Having achieved finality, however, a judicial decision becomes the last word of the judicial*

> *department with regard to a particular case or controversy,* and Congress may not declare by retroactive legislation that the law applicable to that very case was something other than what the courts said it was. Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation-of-powers analysis than it deprives the latter of its significance for due process purposes. *See, e.g., Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532 (1985); *Meachum v. Fano,* 427 U.S. 215 (1976).

514 U.S. at 226-227 (emphasis supplied).

This Court's vigorous protection of the rules of finality against Congressional usurpation was not merely rooted in the doctrine of separation of powers. It was also a defense of the right of the individual litigant to finality in judicial proceedings. The Court quoted dictum as venerable as its decision in *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. 421 (1856):

> "[I]t is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby . . . This, as a general proposition, is certainly not to be denied, *especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it*".

18 How. at 431; *Plaut, supra,* 514 U.S. at 226 (emphasis supplied).

As this Court said in *Plaut,* the choice courts face is apparent: "those clear statements must either be honored, or else proved false." *Id.* Under the analysis of this case adopted by the Ninth Circuit and urged by Respondent, courts retain the power to reopen cases in which finality has been attained, by retroactive application of new procedural rules. A party's "absolute" right thus becomes

relative, and a principle of constitutional importance is undermined.

If Respondent's post-trial motions were untimely, it is incontestable that the judgment became final and no timely appeal was taken thereafter. The judgment became "the last word of the judicial department" with regard to the case. If Congress had sought to reopen such cases by retroactive legislation, this Court would have vigorously defended Petitioners' interest in its finality. The Ninth Circuit has undercut the rationale of finality, and contradicted this Court's guidance in *Plaut*, by discounting the value of that interest. The decision of the Ninth Circuit thus contravenes this Court's philosophy, as consistently expressed in cases over a 139-year span. Consistency requires this Court to address why, if finality of judgment is a principle of constitutional weight which cannot be tampered with by the Congress, it is nevertheless "just and practicable" for lower courts to resuscitate closed cases by the retroactive application of procedural rules.[3]

III. THE NINTH CIRCUIT'S APPLICATION OF *DAUBERT* WILL EXCLUDE VALUABLE AND RELIABLE SCIENTIFIC EVIDENCE

The rule of *Daubert* is that "[s]cientific knowledge is reliable if it is 'ground[ed] in the methods and procedures of science' " and "connotes more than subjective belief or unsupported speculation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 at 590, 125 L.Ed.2d 469, 113

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[3] Respondent characterizes the issue as whether Petitioners may keep a "procedural windfall." Brief in Opposition at 22. If Respondent had violated the rules by filing its motions one date late, instead of violating them by a delay in service, no court would find this argument tenable. It is inarguable that violations of court rules can prevent adjudication on the merits, but the alternative is a system in which rules are supplanted by ad hoc procedure. Consistent justice lies in the former, not the latter, approach.

S.Ct. 2786 (1993). In determining reliability, "[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595. (Pet. App at 10-11). Petitioners have offered extended analysis of the variance between the Ninth Circuit's approach and the "flexible inquiry" *Daubert* requires. Petition at 20-29. Respondent discounts the argument, as it must.

In the final analysis, the Ninth Circuit criticized the evidence submitted by the plaintiffs at trial on the ground that it was based on extrapolation from other data, gathered in other circumstances, totally disregarding the other, well accepted method of reliability: the use of a "differential diagnosis". Respondent emphatically asserts that the "extrapolation method" alone had a "gap" in the analytical process that should have barred the use of the evidence and demonstrates the correctness of the rulings below. Brief in Opposition at 12.

In fact, the approach taken by the Ninth Circuit raises troubling questions. Toxic torts, like airplane crashes, sinkings, train wrecks and other disasters, cannot, by definition, be the subject of reproducible experiment. The available literature on exposure to organic solvents is based on studies of low-dose exposure over time, because that is the only form of exposure which can be studied without engaging in a form of human experimentation. The only way to obtain data from the kind of high-dose, short term exposure to toxins is to study the persons, like the plaintiffs here, who survive such experiences. In short, extrapolation from data gathered in different circumstances may be the *only* method for explaining observable results in cases where the causative event cannot be reproduced. Such extrapolation requires the use of two kinds of inference: inference from other studies which are similar (because they involve similar chemicals, dosages, or other factors) and inferences from the observed data obtained from the victims of exposure. The Ninth Circuit rejected the former inferences on the general ground that the background studies on which the trial experts relied

were "too dissimilar." *See* Pet. App. at 12. The court rejected the second kind of inferences, offered by experts who examined the plaintiffs, because "the biochemical mechanism of neurotoxicity . . . has not been demonstrated," Pet. App. at 13, because a "specific cause and effect relationship" could not be described, and because "science has not yet determined the effects of short-term exposure to the solvents involved," *id.* at 14, even though science *has* determined the toxicity of other organic solvents.

The Ninth Circuit has raised the evidentiary bar too high. *All* medical diagnosis is subject to a degree of uncertainty. The process of "differential diagnosis" is accomplished by testing hypotheses in descending order of probability, as various possible explanations are ruled out by testing, examination, or the course of a patient's illness. Good science does not require a physician to arrive at certainty as the fruit of this process. Good science, in fact, requires the investigator to acknowledge Sherlock Holmes' dictum that when other explanations are excluded, whatever remains, must be the truth. The dictum holds true even if the exclusion of competing explanations requires the use of extrapolation, interpolation, and inference. The Ninth Circuit has rejected Petitioners' evidence not merely because of a dispute about an alleged failure to offer dose-specific testing, but because the Ninth Circuit has now disavowed the forensic use of an entire process of medical and scientific reasoning: the differential diagnosis methodology. As set forth in the Petition this process is well accepted and has been approved by other Courts, including the Ninth Circuit.

In a discussion of "good" and "bad" scientific uses of extrapolation, a comparison to a recent toxic tort case in this Court is instructive.

In *General Electric v. Joiner*, __ U.S. ___, ___ L.Ed.2d ___, 118 S.Ct. 512 (December 15, 1997) this Court criticized a plaintiff's proof as inadequate under *Daubert* for two reasons. First, animal studies relied on by the plaintiff's expert were not similar to the facts of the case: the

studies involved infant mice that developed alveologenic adenomas after highly concentrated, massive doses of PCBs were injected directly into their peritoneums or stomachs, whereas the plaintiff was an adult human whose small-cell carcinomas allegedly resulted from exposure on a much smaller scale. *Joiner, supra*, slip op. at 6-7. This Court also criticized four epidemiological studies on which the plaintiff relied; they were not a sufficient basis for the experts' opinions, since the authors of two of those studies ultimately were unwilling to suggest a link between increases in lung cancer and PCB exposure among the workers they examined, the third study involved exposure to a particular type of mineral oil not necessarily relevant to the plaintiff's situation, and the fourth involved exposure to numerous potential carcinogens in addition to PCBs. Slip op. at 7-9. There was therefore a logical gap between the evidence offered and the conclusion the experts drew, a gap which was not crossed by reasoned inference. As this Court said, "[n]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert." Slip op. at 9.

The evidence in this case was not defective for the reasons which attended the evidence in *Joiner*. The Ninth Circuit has failed to distinguish between the irrational "ipse dixit of the expert" and the rational process of drawing inferences from available information. The studies relied on in this case were not animal studies of questionable relevance; they were studies of human occupational exposure to similar chemicals which demonstrated the toxicity of organic solvents. Where this Court, in *Joiner*, approved the exclusion of *specific evidence* which was rationally unconnected to the issues at trial, the Ninth Circuit has excluded an *entire mode of reasoning*: the process of reasoning by inference from the available data. This rule will exclude evidence of scientific value and probative force.

Two historical examples prove the point. In 1796, Edward Jenner reasoned that smallpox could be avoided by prior exposure to cowpox; he reached that conclusion at a time when medical science had not demonstrated the mechanism of smallpox transmission, could not explain the immune-system process which made vaccination possible, and could not articulate a cause and effect relationship which would explain the observed data. It was Jenner who first hypothesized the existence of an organism which he named a "virus," but the existence of such an organism could not be *documented* until the development of the electron microscope.

Louis Pasteur's work was similarly "flawed." His belief that effects as dissimilar as infection in humans and the souring of milk were both caused by the introduction of micro-organisms from external sources flew in the face of the conventional wisdom, and his belief that small organisms could kill larger ones was viewed as ridiculous. But even though he could not *articulate* a cause and effect relationship between invisible organisms and perceived effects, and even though medical science had yet to identify the disease process as such, he was able to demonstrate that his inferences were well-grounded by showing a skeptical community experimental data which supported them: the fact that healthy sheep exposed to the blood of sick sheep became sick.

In the absence of other explanations, Pasteur's hypothesis, like Jenner's, gained acceptance *in advance of* the development of definitive explanations for the observed facts, and without the development of a complete theoretical framework for the theory of immunology. Their work had in common the fact that their inferences were reasonable extrapolations from existing data. The fact that the existence of other, more persuasive data could be *imagined* was no reason to ignore the probative force of the evidence at hand.

Daubert should not be read as an insurmountable barrier to any litigant who has the misfortune to be injured by a mechanism which science has not yet fully

understood. The power and probative force of inferential reasoning is well-documented in the history of science. The persuasiveness of a given line of reasoning is a question of weight, not admissibility, as long as the expert's inferences are plain to see and open to cross-examination. In *Joiner*, the expert's "inferences" were actually shorthand for the practice of ignoring logical gaps in the facts; alleged similarities fell apart on close examination. But where, as here, the expert can point to truly similar data developed in other contexts, and follows the accepted medical diagnostic technique of "differential diagnosis," there is far more at work than the mere "ipse dixit of the expert." The probative value of the similarities, like the probative force of any reasoned inference, tied with the differential diagnosis methodology is then for the trier of fact to evaluate.

IV. CONCLUSION

For the forgoing reasons, Petitioners pray that the Supreme Court will grant their petition and correct the errors of the Ninth Circuit.

DATED this 20th day of April, 1998.

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